CHAPTER 3
ISSUES

3.1 With one exception, the provisions of the Bill met with general approval among submitters.[1] Significantly, the primary body representing users of the native title system, the National Native Title Council, regarded the changes as uncontroversial.[2] Some submitters offered general support for the Bill's objectives with limited qualifications, while still others argued for changes to native title arrangements that were not foreshadowed in the Bill.[3] The main critic of the Bill was the National Native Title Tribunal (NNTT), which objected to the provisions of Schedule 1, which would allow the Federal Court of Australia (the Court) to refer cases to mediation to parties other than the Tribunal.[4]

Mediation

3.2 Perhaps the most controversial of the changes the Bill would introduce are those that remove the compulsory reference of matters for mediation to the NNTT. The Government's proposals aim to address a very significant backlog of claims for settlement. The committee heard that 145 determinations were made from 1994, when the Native Title Act was passed, to the end of 2008. The average time taken to finalise these was about 6 years where the application was by consent, or 7 years where the outcome was litigated. About 475 claims are currently on foot in the system. Over a quarter of cases have been current for at least 10 years. It is estimated that the last of cases currently active will not be concluded until 2035.[5]

3.3 The Tribunal's concerns derive largely from the Bill's proposal to centralise the management of native title cases in the Court, and hinge on the assertion that the amendments would not necessarily bring about a faster or more efficient claims settling process.

3.4 The NNTT argued that the Bill's passing could give rise to accountability issues when mediators operate outside a 'governmental institution', and would see

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1 See, for example, Northern Territory Government, *submission 7*, p. 1; Federal Court of Australia, *Submission 1*, p. 1.

2 Mr Tony McAvoy, *Committee Hansard*, 16 April 2009, p. 19. The Council's substantive argument related to the burden of proof for proving an ongoing connection to land and the role this allegedly plays in denying 'right and proper' ascertainment of native title rights.

3 See, for example, the National Native Title Council, as per previous footnote. See also Torres Strait Regional Authority, S*ubmission 5*, pp 4–5 regarding funding for PBCs.

4 National Native Title Tribunal, S*ubmission 3*, p. 1.

5 Mr Graham Neate, *Committee Hansard*, 16 April 2009, pp 10–11.

fewer resources being available to fund 'flexible and innovative solutions…in a timely manner'.[6]

3.5 The NNTT submitted to the committee that the amendments would encourage a system that was 'ad hoc, fragmented, less efficient [and] more expensive to the Commonwealth' and that 'there could be confusion, and lack of clarity, about the respective powers and functions of the Court and the Tribunal – especially the extent of the Court's capacity to direct the Tribunal to do things (and possibly to allocate Tribunal members to mediate particular matters, and to direct how mediation is to be conducted), which raise legal and resource issues'.[7] The NNTT argued that:

> One [concern] is that the court will be able to refer part or the whole of a matter to a person or body for mediation. It may be that the matter itself is then broken up into segments—somebody deals with a particular issue and somebody else deals with another issue...One of our concerns is that when matters are referred to us generally, we can develop a regional strategy obviously in conjunction with the court directed by court orders and so on which have regard to the respective resources of the parties and can put some sort of system in place…Our concern is that if these matters are hived off to individuals or bodies particularly for particular segments some of that overall coordination of a particular claim and then the coordination of that claim with a broader region may be disrupted and indeed there may be duplication or fragmentation of services, which in the end could become more expensive to the Commonwealth rather than less so.[8]

3.6 Mr Neate argued that, on the other hand, the current system:

> clearly …identifies the respective roles of the Court and the Tribunal. When both institutions work in a coordinated and cooperative manner, timely and effective native title and related outcomes (i.e., broader settlements) are achieved. The Tribunal considers that the current scheme for the mediation of native title claims should be retained.[9]

3.7 While the NNTT made much of its particular expertise and experience in addressing native title issues[10], the committee is mindful of the conclusions of Australian Labor Party and Australian Greens' Senators in the committee's 2007 inquiry into the provisions of the Native Title Amendment Bill 2006, when they found that:

> During the inquiry, significant concerns were expressed about the expansion of the NNTT's powers, particularly as most stakeholders do not have confidence in the NNTT's capacity or expertise to conduct effective

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6 National Native Title Tribunal, S*ubmission 3*, p. 5.

7 National Native Title Tribunal, *Submission 3*, p. 1.

8 Mr Graham Neate, *Committee Hansard,* 16 April 2009, p. 9. The committee was subsequently informed by the Registrar of the federal Court, Mr Warwick Soden, that the Court intended to conduct the new scheme within its present budget, *Committee Hansard*, 16 April 2009, p. 47.

9 National Native Title Tribunal, S*ubmission 3*, p. 2.

10 See, for example, National Native Title Tribunal, S*ubmission 3*, p. 6.

> mediation…Evidence received by the committee from NTRBs unanimously rejected the expansion of the NNTT's mediation function, citing past statistics and experience…like a majority of stakeholders, Labor and Greens Senators are not convinced that the NNTT is capable of exercising these expanded powers effectively, or properly.[11]

3.8 The NNTT's contention that the changes will not bring about improvements in the claims process was disputed by the Court. In his evidence to the inquiry, Registrar Warwick Soden told the committee that the change was:

> …welcomed by the Court as it supports its long held view that results are obtained through a flexible and responsive approach to mediation. This view is based on the Court's experience of the beneficial results of active case management by the Court in some native title proceedings… Under the proposed amendments the Court will be able to apply innovative approaches to the emerging issues, including referral of a matter to the Tribunal for mediation, court annexed mediation, the management of expert evidence, early neutral evaluation, case conferences and other practical [alternative dispute resolution] procedures.[12]

3.9 In his evidence at the hearing, Mr Soden set out at length the Court's experience with case management, and told the committee that:

> The court has a wealth of experience in managing a whole lot of different cases, including native title cases. It applies the principles of active case management. It has an international reputation for the way in which it is innovative and brings to bear the best approach to the issues that need to be resolved in different cases. In terms of coordination across the country, the court has specialist lawyers in each of the states and territories or former territories across Australia. They are experts in native title. They work closely with the judges in each of those states, particularly the native title judges who have responsibility for coordination in each state. They are in a very good position to give advice and assistance to the judges about what needs to be done in a particular matter to ensure coordination and this constant discussion between the judges across the states about coordinating issues, including priorities and the like.[13]

3.10 Mr Soden took the view that the Court was in the best position to decide on which mechanism was in the best interest of each case, including the existing option of referring the case to the NNTT, and impressed on the committee the flexibility that the changed arrangements would bring to the management and resolution of cases. He went on to say that:

> It may be that a special referral to a case management conference under the direction of a judge might be most appropriate. It might be that a special

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11 Senate Legal and Constitutional Affairs Committee, *Inquiry into the Native Title Amendment Bill 2006 [Provisions]*, Minority Report of the Australian Labor Party and the Australian Greens, pp 63, 65.

12 Mr Warwick Soden, S*ubmission 1*, pp 1–2.

13 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 49.

> hearing on a specific issue that needs to resolved before any mediation could take place would be the most beneficial thing to be done in a particular case. It might be that the court thinks the best thing to do is refer the matter to one of the court's staff or another particular person who was not a member of the tribunal to exercise the mediation powers of the court by referral. It might even be a referral to the tribunal in the ordinary course.[14]

3.11 Impressive though these options may be for increasing the tempo of settlements, the committee is mindful of the need for care when appointing mediators. The Bill conveys considerable flexibility on the referring judge, and the skill, expertise and qualifications of the candidate require examination, not to mention the identification of any potential for conflicts of interest. While Mr Soden submitted that such matters would 'automatically' be considered prior to any referral, the method of assessment, particularly for a mediator unknown to the Court, was not clarified in evidence.[15]

3.12 However, Mr Soden sought to reassure the committee that the Court was aware that much was expected of it under the changes, and that it was confident of its ability to deliver:

> I just wanted to reiterate the court's view that we take this proposed responsibility very seriously. We know it will come with a degree of accountability. We know there are a lot of expectations to be placed upon us as a result of the extra responsibility and accountability, but we embrace that. These cases are crying out for a new and innovative approach to be taken. We believe, with the broad experience we have not only in this jurisdiction but in the way in which cases can be looked at and treated differently, we will bring those changes which will speed up the whole process and produce outcomes.[16]

3.13 The committee was further encouraged by evidence that the amendments were framed in the context of appropriate consultation by the Attorney-General's Department. The committee heard that representatives of the Attorney-General met with officers of the Court and the NNTT on three occasions to discuss the proposed amendments. This followed the release of a discussion paper in December 2008, which elicited 30 submissions.[17] The NNTT reassured the committee that they would continue to work closely with the Court to administer the new scheme.

3.14 The committee is mindful of the imperative to put in place a more efficient process for hearing and deciding native title claims. While the arguments of the NNTT and others that native title is inherently complex and drawn-out, the committee is

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14 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 49.

15 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 56.

16 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 49.

17 Mr Warwick Soden, S*ubmission 1*, p. 1. These are available on the Department's website at www.ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08#submissions.

impressed by the innovations and flexibilities offered by the Federal Court taking a more central role in case management. The capability of the Court is clear, and the committee considers there is good reason to anticipate a smoother and more expeditious flow of native title case management as a result of the changes being implemented. For these reasons, and in the absence of substantive criticism[18] of other aspects of the Bill, the committee recommends the Bill be passed.

Representative Bodies

3.15 The Torres Strait Regional Authority (TSRA) argued for an amendment to section 201B(1) of the Act which currently provides that Prescribed Bodies Corporate (PBCs), which are the rights-holding bodies for native title claimants, are not eligible bodies for consideration as Native Title Representative Bodies (NTRBs). TSRA called for the relaxation of this restriction, at least in respect of the Torres Strait, on the basis of the unique and special circumstances which largely derive from the Torres Strait Regional Sea Claim that is currently awaiting settlement.[19]

3.16 The Committee took no other evidence on this topic, and in any case further committee attention and examination might best take place when the details of the Sea Claim settlement are known. Accordingly, the committee makes no recommendation in respect of this matter.

Australian Human Rights Commission

3.17 The Australian Human Rights Commission (AHRC) made a substantive submission to the inquiry covering a number of issues. The Commission recommended amendments to the Bill going to, for example:

- consultation by the Court with parties to a mediation;
- the regulation of the number of parties to a claim;
- the requirement for court orders to be 'appropriate';
- the application of the *Evidence Act 1995* to native title claims;
- funding of participants in a native title claim; and
- the expansion of ministerial discretion in appointing NTRBs.

3.18 While these and other recommendations warrant further examination, the Commission's submission was received after the committee's public hearing, denying the opportunity to test the propositions put forward and benefit from any alternative views expressed by other interested parties. Accordingly, the committee suggests that the Government consider the points raised by the Commission with a view to incorporating them into future native title reform.

Recommendation

3.19 The committee recommends that the Bill be passed.

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18 Comments from the Australian Human Rights Commission are dealt with later in this chapter.

19 Torres Strait Regional Authority, *Submission* 5.

Senator Trish Crossin

Chair